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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-845

ALAMEDA COUNTY WATER DISTRICT, *Petitioner,*

vs.

TEJPAL S. SETHY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November, 1979

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TEJPAL S. SETHY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Alameda County Water District petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported as *Sethy v. Alameda County Water District,* 602 F.2d 894. The opinion and judgment of the Court of Appeals is reproduced as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1979. On November 2, 1979, Mr. Justice Rehn-

quist issued an order extending the time for filing a petition for writ of certiorari to and including December 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals gave the Civil Rights Attorney's Fees Awards Act of 1976 a more extensive retroactive application than the Congress intended it should have?

2. Whether the Court of Appeals' retroactive application of the Civil Rights Attorney's Fees Award Act of 1976 conflicts with applicable principles governing the retroactive application of Federal law as enunciated by this Court?

3. Whether the District Court had jurisdiction to entertain a post-judgment motion for an award of attorney's fees which would constitute an amendment of the judgment after it had become final following affirmance on appeal?

STATUTE INVOLVED

The statute involved in this case is the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988. The text of this statute is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as ''The Civil Rights Attorney's Fees Awards Act of 1976".
>
> "Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

As codified in 42 U.S.C. 1988, this statute reads as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT

On May 20, 1971, respondent Sethy brought suit in the United States District Court for the Northern District of California against petitioner, the Alameda County Water District and three supervisory employees—its General Manager and Chief Engineer, its Assistant Chief Engineer, and the Head of its Distribution Section. Alleging that he had been harrassed, humiliated, and demoted while employed by the Water District and ultimately discharged because of his race and national origin, Sethy sought damages and injunctive relief reinstating him to his employ-

ment. His claim for relief was grounded upon the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. Jurisdiction of the District Court was based upon 28 U.S.C. § 1343(4).

On September 29, 1972 a jury returned a verdict in favor of the three individual defendants on all claims and against the Water District on the Section 1981 claim for damages in the amount of $35,000.

By an order entered April 30, 1973, the District Court denied Sethy's post-trial motion for attorney's fees. The Court ruled that the allowance of attorney's fees was within its equitable discretion and in the light of the split verdict among the defendants and the award of money damages, it would not award attorney's fees to Sethy. (The portion of the April 30, 1973 order relating to attorney's fees is set forth as Appendix B to this petition.)

On October 16, 1973, the District Court entered its judgment in favor of the individual defendants and against the Water District awarding Sethy the damages assessed by the jury and his costs of suit, excluding attorney's fees, and reinstating him to his former position.

The Water District appealed from the judgment against it and Sethy cross-appealed from the judgment in favor of the individual defendants. On September 20, 1976, the Court of Appeals filed an en banc opinion affirming the District Court's judgment. *Sethy v. Alameda County Water District,* 545 F.2d 1157. On October 4, 1976 the Water District petitioned for rehearing.

On October 19, 1976, the Civil Rights Attorney's Fees Award Act became law. A week thereafter on October 26, 1976, the Court of Appeals denied the Water District's petition for rehearing and on November 3, 1976 it issued its mandate to the District Court. On November 12, 1976 the certified mandate was filed of record in the District Court.

On February 28, 1977, Sethy moved the District Court for an award under the Civil Rights Attorney's Fees Awards Act of a fee of $75,000 for the services rendered by his attorney since the inception of the litigation. On March 18, 1977, the District Court denied the motion on alternative grounds—(1) that the Act did not apply because the Court of Appeals affirmed the District Court's judgment before the Act became effective; and (2) that to the extent the Act was applicable the Court, in the exercise of its discretion to avoid a windfall award, would deny attorney's fees for the reasons stated in its prior order of April 30, 1973; namely because of the split verdict among the defendants and the award of money damages. (The portion of the District Court's order of March 18, 1977 relating to attorney's fees is set forth in Appendix C to this petition.)

Sethy appealed from this order and on August 16, 1979, the Court of Appeals issued the opinion and decision which is the subject of this petition. 602 F.2d 894. (Appendix A). The Court of Appeals ruled that the Civil Rights Attorney's Fees Award Act governed the award of attorney's fees because the appeal on the merits was still pending when the Act became effective on October 19, 1976. The Court determined that the appeal remained pending until finality

was achieved by the issuance of its mandate on November 3, 1976 following its denial of the petition for rehearing on October 26, 1976. The Court further found that the reasons given by the District Court for denying attorney's fees in the exercise of its discretion did not constitute exceptional circumstances justifying denial of attorney's fees under the Act. It remanded the cause to the District Court to determine if any such special circumstances existed, and, if they did not, to award a reasonable fee.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. It has also so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals adopted a simplistic mechanical process for determining the retroactive applicability of the Civil Rights Attorney's Fees Awards Act. First, determine whether the case was "pending" in any technical sense on the effective date of the Act. If so, then apply the Act without any consideration of its impact under the circumstances of the case.

The utilization of this process by the Court of Appeals contravened the teachings of this Court regarding the retroactive application of statutes and new judicial rules. It also resulted in a retroactive application of the Act in a manner not intended by the Congress. The legislative history of the Act demonstrates that the Congress did not intend it to be mechanically applied to every "pending"

case, but rather to be applied to pending cases in accordance with applicable decisions of this Court.[1]

If the decision of the Court of Appeals is permitted to stand it will not only provide the basis for erroneous applications of the Civil Rights Attorney's Fees Award Act but the basis for misinterpretation of the principles set forth by this Court as a guide to the proper retroactive applications of statutes and new judicial rules.

Ironically, the Court of Appeals purported to rest its decision on the decision of this Court in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (June 23, 1978). Yet, in *Hutto* this Court sanctioned the application of the Civil Rights Attorney's Fees Award Act to a pending case in a manner that did not even remotely resemble the manner in which the Act was applied by the Court of Appeals in this case.

Hutto was a suit by prisoners in the penal system of the State of Arkansas against State prison officials for alleged violations of Federal constitutional rights. The District Court entered certain remedial orders and an order awarding attorney's fees to be paid out of State Department of Corrections Funds. 410 F.Supp. 251 at 281-285. The Court of Appeals for the Eighth Circuit affirmed and also made an award of attorney's fees for service on the appeal, itself. 548 F.2d 740 at 743 (1977). On certiorari, this Court approved the award of attorney's fees by the District Court solely on the basis of the District Court's

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[1]The House Report states: "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." (H.R.Rept. No. 94-1558, 94th Cong. 2nd Sess. p.4, n. 6 (1976).)

finding of "bad faith" on the part of defendants. The award of fees by the Court of Appeals for services on the appeal was found by this Court to be supported by the Civil Rights Attorney's Fees Award Act which had become effective before the appeal was determined and was considered by the Court of Appeals in deciding the appeal. 437 U.S. 678 at 693-95. In a footnote, (437 U.S. 678, 694-95, n. 23), this Court, in answer to an argument that the Act should not apply to pending cases, stated that the legislative history defeated this argument and referred to the comment in the House Report that the Act was intended to apply to all cases pending on the date of enactment in accordance with applicable decisions of the Supreme Court. (See footnote 1, *supra*).

Since in *Hutto,* this Court sanctioned the application of the Act only to support an award of attorney's fees for services on an appeal which was undetermined when the Act became law, that application had virtually no retroactive character. Certainly, this Court's approval of the application of the Act in *Hutto,* provides no support whatever for the decision of the Court of Appeals in this case. Here the Court of Appeals has made the extraordinary ruling that the mere fact that the Act became effective while a futile petition for rehearing was pending requires the District Court to award attorney's fees upon a motion made after the judgment awarding costs without attorney's fees had become final.

The legislative history of the Civil Rights Attorney's Fees Award Act militates against the Court of Appeals' conclusion that the Act must be mechanically applied to

any case that can be labeled as "pending" when the Act became law.

The Act was the Congressional response to this Court's decision in *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 230, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) which held that the private attorney general doctrine could no longer be utilized as the basis for an award of attorney's fees in the absence of statutory authority. The Senate Report noted that the Act "remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska,* and makes our civil rights laws consistent." (Sen.Rept.No. 94-1011, 94th Cong. 2d Sess. p. 4; U.S. Code Cong. & Admin. News 1976, pp. 5908, 5912).

In the Congressional debate on the Act, Representative Anderson remarked that: "(I)t would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent it is retroactive. Pending cases *could* receive an award of reasonable fees." (emphasis added). 122 Cong. Rec. 35118 (October 1, 1976). Senator Abourezk also stated that: "This application is necessary to fill the gap created by the *Alyeska* decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." 122 Cong. Rec. 33314 (September 29, 1976).

It is evident that the Congressional concern was that the Act not be regarded as inapplicable to litigation in

progress merely because the litigation had been instituted prior to the Act's effective date. There is not the slightest indication that the Congress intended that the Act should be mechanically applied retroactively in every case that might be labeled as "pending" on the Act's effective date. To the contrary, as has been noted, the House Report states that the Act is intended to apply to all cases pending on the date of its enactment "in accordance with applicable decisions of the Supreme Court," citing as an applicable decision *Bradley v. Richmond School Board,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). See footnote 1, *supra.*

Bradley was a protracted school desegregation case in which the District Court had awarded attorney's fees under the private attorney general doctrine for services rendered over an eleven-month period in obtaining modification of a desegregation plan. The Court of Appeals reversed on the ground that such an award should not be made without Congressional authorization. The Court of Appeals ruled that a statute which became effective before the appeal was determined could not provide the statutory basis for an award of fees for services rendered before its effective date. On certiorari, this Court held that the statute could be applied to attorneys services rendered before its effective date inasmuch as the propriety of the fee award was pending resolution on appeal when the statute became law. This Court stated that it anchored this holding "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." 416 U.S. at 711; 94 S.Ct. at 2016.

It is evident that this principle enunciated in *Bradley* does not support the extreme retroactive application of the Civil Rights Attorney's Fees Award Act by the Court of Appeals in the present case. In this case Sethy had not taken an appeal from the April 30, 1973 order of the District Court denying attorney's fees in the exercise of its discretion; nor had he appealed from the District Court's October 16, 1973 judgment against the Water District which awarded him his costs of suit, without attorneys' fees. Thus the propriety of the District Court's denial of attorney's fees was not pending resolution on appeal when the Civil Rights Attorney's Fees Award Act became law. Nor did that Act constitute the law in effect at the time the Court of Appeals rendered its decision on the issues that were tendered by the appeal taken by the Water District. That Act became law after the Court of Appeals rendered its decision and while only a petition for rehearing was pending.

It is manifest that the Court of Appeals' retroactive application of the Civil Rights Attorney's Fees Award Act in this case represents a complete departure from the guiding principles enunciated by this Court to govern the retroactive application of statutes.

Indeed, upon analysis it appears that by its decision in this case, the Court of Appeals is directing the District Court to amend a final judgment to allow attorney's fees as part of the costs although the District Court has lost jurisdiction to amend the judgment.

The October 16, 1973 judgment of the District Court against the Water District had become final prior to the time that Sethy moved the District Court on February 28,

1977 for attorney's fees as an item of costs. On November 3, 1976 the Court of Appeals had issued its mandate on its judgment affirming the judgment of the District Court. The certified mandate had been filed of record in the District Court on November 12, 1976. The time for a petition for certiorari to review the judgment of the Court of Appeals had expired on January 24, 1977, ninety days after the Court of Appeals' denial of the petition for rehearing on October 26, 1976.

The District Court's October 16, 1973 judgment had awarded Sethy his costs of suits, excluding therefrom attorney's fees which the District Court in its April 30, 1973 order had denied in the exercise of its equitable discretion. Thus Sethy's February 28, 1977 motion, requesting an award of attorney's fees as an item of costs, was in effect a motion to amend the judgment from which attorney's fees had been excluded as an item of costs.

At this stage of the proceedings, the District Court had been divested of jurisdiction to alter the judgment in any manner. The applicable jurisdictional principles have long been established by decisions of this Court.

After an appellate court has issued its mandate affirming the judgment of a lower court, the further jurisdiction of the lower court, if any, is dependent upon the terms of the appellate mandate. The lower court has no power or authority to deviate from the mandate but is bound thereby and cannot reopen questions which the mandate has laid to rest. *Durant v. Essex Company*, 101 U.S. 555, 25 L.Ed 961 (1879). *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948).

In *DuBuit v. Harwell Enterprises Enterprises, Inc.*, 540 F.2d 690 (1976), the Court of Appeals for the Fourth Circuit applied these principles in reversing a post-appeal order of the District Court awarding attorney's fees in a patent infringement case. In a very recent well-considered opinion, Judge Warriner of the United States District Court for the Eastern District of Virginia applied these principles in declining to entertain a post-appeal motion for an award of attorney's fees under the Civil Rights Attorney's Fees Award Act. *Hirschkop v. Snead*, 475 F.Supp. 59 (Aug. 2, 1979).

CONCLUSION

The retroactive application by the Court of Appeals of the Civil Rights Attorney's Fees Award Act is in conflict with applicable decisions of this Court setting forth the governing principles for the retroactive application of statutes. The Court of Appeals' decision which ignores accepted principles regarding the finality of judgments and which would require the District Court to take action in excess of its jurisdiction so far departs from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. A writ of certiorari to review the judgment of the Court of Appeals should therefore be granted.

Respectfully submitted,

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Of Counsel

November, 1979

Appendices

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

No. 77-2165

Tejpal S. Sethy,
Plaintiff-Appellant,

vs.

Alameda County Water District, et al.,
Defendants-Appellees.

[Filed Aug. 16, 1979]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: TRASK and ANDERSON, Circuit Judges, and WYATT,* District Judge

PER CURIAM:

Plaintiff-appellant Tejpal S. Sethy appeals from the district court's March 18, 1977 order denying Sethy's motion for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988.[1] We reverse.

*Honorable Inzer B. Wyatt, Senior United States District Judge, for the Southern District of New York, sitting by designation.

[1]42 U.S.C. § 1988 reads, in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or

On May 20, 1971, Sethy filed suit against the Alameda County Water District and certain named individuals. He sought injunctive relief and damages for alleged violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. Following a six week trial, on September 29, 1972, the jury returned a verdict in favor of the individual defendants on all claims and against the Water District on the section 1981 claim. The jury assessed damages against the Water District in the amount of $35,000. In an order entered April 30, 1973, the district court awarded court costs to Sethy but denied his request for attorney's fees.[2] On October 12, 1973, the court entered judgment in Sethy's favor, directing the Water District to pay Sethy $35,000 in damages and to reinstate him to his former position. The Water District appealed the judgment to this court, and Sethy cross-appealed. On September 20,

charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[2]In its April 30, 1973 order, the district court denied Sethy's request for attorney's fees for these reasons:

"[T]he plaintiff requests attorney's fees and costs of suit. The Court will award costs of suit, to be recovered by the plaintiff from the defendant Water District as authorized by Rule 54(d), Fed.R.Civ.P. However, there is no statutory provision authorizing the award of attorney's fees in this type of action. In the fact [sic] of such statutory silence, the courts have generally placed the award of attorney's fees within the equitable discretion of the trial court. *See, e.g., Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

In light of the split verdict among the defendants in this case, and in view of the fact that the jury has awarded money damages, this Court will deny the award of attorney's fees to the plaintiff herein."

C.R. 171-72.

1976, we filed an opinion affirming the district court's judgment. *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc). The Water District petitioned for rehearing on October 4, 1976. The timely filing of the rehearing petition automatically stayed the issuance of this court's mandate. See Fed.R.App.P. 41(a). We denied the petition on October 26, 1976, and our mandate issued on November 3, 1976.

On October 19, 1976, the Civil Rights Attorney's Fees Awards Act of 1976 was signed into law by the President. Sethy applied to the district court for an award of attorney's fees under the Act. On March 18, 1977, the district court denied Sethy's request, holding that the Act did not apply because our opinion affirming the judgment was filed before October 19, 1976, and that even if the Act did apply Sethy was not entitled to an attorney's fees award.[3]

[3]It is the March 18, 1977 order which Sethy challenges in this appeal. That order incorporated by reference the reasoning set forth in the April 30, 1973 order. *See* n.2 *supra*. The relevant portion of the March 18, 1977 order reads as follows:

"4. *Attorneys' Fees*

Although an award of attorneys' fees was authorized by the Civil Rights Attorneys' Fees Award Act of 1976 in cases of employment discrimination brought pursuant to 42 U.S.C. § 1981, and although the Ninth Circuit has held that the Act applies retroactively to all cases pending on the date of its enactment, plaintiff's motion for reconsideration of the court's denial of attorneys' fees is denied.

First, this case was not pending on the date of enactment. The Act was signed into law on October 19, 1976; the Ninth Circuit affirmed this court's decision in September, 1976. The court does not regard the motions now before it as maintaining the pendency of the action. This case was decided and affirmed prior to the Act's enactment date; all that is before the court now is certain details of implementation, and not the merits of the dispute itself.

Second, an award of attorneys' fees in any event lies within the court's discretion. Though the court should ordinarily

In *Hutto v. Finney,* 437 U.S. 678, 694-95 n.23 (1978), the Supreme Court held that the Act applies to all cases in which appeals were pending on October 19, 1976. *See also Molina v. Richardson,* 578 F.2d 846, 854 (9th Cir. 1978); *Fountila v. Carter,* 571 F.2d 487, 496 (9th Cir. 1978); *Verrilli v. City of Concord,* 557 F.2d 664, 665 (9th Cir. 1977); *Stanford Daily v. Zurcher,* 550 F.2d 464, 466 (9th Cir. 1977), *rev'd on other grounds,* 436 U.S. 547 (1978). The first question we must decide is whether Sethy's case was "pending" on October 19, 1976. We hold that it was.

Although our opinion affirming the district court's judgment was filed before the Act was signed, our mandate did not issue until November 3, 1976, fifteen days after the Act went into effect. This court retained control of the judgment until the mandate issued. *See Aerojet-General Corp. v. American Arbitration Ass'n.,* 478 F.2d 248, 253-54 (9th Cir. 1973). Given this retention of control, the Water District's appeal and Sethy's cross-appeal were considered "pending in this court until finality was achieved on November 3, 1976. Therefore, Sethy was entitled to request an award of attorney's fees under the Act. The district court erred in holding otherwise.

Having decided that the District court had discretion to award attorney's fees to Sethy, we now turn to the remaining question of whether the court abused its discretion in denying an award. Congress plainly intended that successful plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted* in [1976] U.S. Code Cong. & Ad. News 5908, 5912, *quoting Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). *See also Mid-Hudson Legal Services, Inc. v. G & U Inc.,* 578 F.2d 34, 37-38 (2d Cir. 1978); *Wharton v. Knefel,* 562 F.2d 550, 557 (8th Cir. 1977). Implicit in this expression of congressional intent is a requirement that a court which denies an award of attorney's fees must issue findings of fact and conclusions of law identifying the "special circumstances" and explaining why they render an award unjust. The court below identified three such circumstances:[4] (1) an award to Sethy would be an undeserved "windfall"; (2) Sethy was only partially successful on the merits (*i.e.,* the jury found the Water District liable but found the individual defendants not liable); (3) the jury awarded money damages. We conclude that none of these factors was a "special circumstance" warranting denial of attorney's fees.

The first ground is manifestly inadequate. An award of attorney's fees in the instant case would no more constitute an undeserved "windfall" than did the awards in *Hutto v. Finney, supra,* and the numerous other cases in which the Act was given retroactive application. With regard to the second ground, the mere fact that Sethy was not victorious as to all defendants does not automatically bar an attorney's fees award. We agree with the First

award such fees unless special circumstances render such an ward unjust, Congress expected the courts to use their discretion to avoid windfall awards. *Compare Newman v. Piggie Park Enterprises,* Inc., 390 U.S. 400, 402 (1968), with *H. Rep.* 94-1558, 94th Cong., 2d Sess. 9 (1976).

To the extent that the Act is applicable to this case, therefore, the court denies an award of attorneys' fees for the reasons stated in its order of April 30, 1976 [sic—the year should be 1973]."

[4] *See* nn. 2, 3, *supra.*

Circuit's view that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful." *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978). Sethy succeeded on his 42 U.S.C. § 1981 claim against the Water District, which was one of the most significant issues in litigation (*see Sethy v. Alameda County Water Dist., supra*), and therefore he must be deemed a "prevailing party" within the meaning of the Act. The third ground listed by the district court—the jury's damages award—was also an insufficient basis on which to deny attorney's fees. The Act's legislative history states that "the mere recovery of damages should not preclude the awarding of counsel fees." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976).

It is, of course, conceivable that there are "special circumstances" associated with this case which warrant discretionary departure from the general rule that prevailing plaintiffs are entitled to recover attorney's fees. However, thus far the district court has not identified any such circumstances. We therefore reverse and remand the case to the court below for reconsideration in light of the policies which Congress sought to effectuate when it passed the Act. *See Molina v. Richardon, supra,* 578 F.2d at 854 n.16. On remand, if the district court is unable to identify any special circumstances that would render an award of

attorney's fees unjust,[5] it should grant a reasonable fee based upon such factors as those enumerated in *Fountila v. Carter, supra,* 571 F.2d at 496.

The order of the district court is reversed, and the cause is remanded for further proceedings.

[5]For an example of the special circumstances which another circuit considered sufficient to warrant denial of an attorney's fees award, *see Naprstek v. City of Norwich,* 433 F.Supp. 1369 (N.D.N.Y. 1977), cited with approval in *Nadeau v. Helgemoe, supra,* 581 F.2d at 279 n.3.

APPENDIX B

In the United States District Court for the
Northern District of California

No. 71-973

Tejpal S. Sethy,
Plaintiff,

vs.

Alameda County Water District, et al.,
Defendants.

MEMORANDUM AND ORDER

Plaintiff is a United States citizen of East Indian descent. He instituted this civil rights action against his former employer, the Alameda County Water District (hereinafter "the Water District") and against three named individuals who were Water District employees and had served in various supervisory positions over the plaintiff. The plaintiff alleged harassment, demotion, and finally discharge from his employment with the Water District based on his race. He sought both damages and injunctive relief in the form of reinstatement to his former position with the Water District.

This matter was tried by a jury, with the Court permitting the jury to consider the issue of damages against the Water District under 42 U.S.C. § 1981 and the issue of damages against the individual defendants under 42 U.S.C. §§ 1981 and 1983. The jury returned a verdict in favor of the individual defendants and against the defendant Water District, assessing damages against it under § 1981 in the sum of thirty-five thousand dollars

($35,000.00). The Court reserved ruling on the plaintiff's requested reinstatement pending the jury's decision.

Both the plaintiff and defendant Water District have filed various timely post-trial motions, and the Court will now rule on them as follows.

Plaintiff's Motions

The plaintiff has filed motions for reinstatement, for judgment N.O.V., for reconsideration of the issue of damages against the Water District under § 1983, for a new trial on certain conditions, and for his costs of suit and attorney's fees. Each of these motions will be discussed *seriatim.*

• • • •

Finally, the plaintiff requests attorney's fees and costs of suit. The Court will award costs of suit, to be recovered by the plaintiff from the defendant Water District as authorized by Rule 54(d), F.R.Civ.P. However, there is no statutory provision authorizing the award of attorney's fees in this type of action. In the fact of such statutory silence, the courts have generally placed the award of attorney's fees within the equitable discretion of the trial court. *See, e.g., Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. den.*, 396 U.S. 1061 (1970).

In light of the split verdict among the defendants in this case, and in view of the fact that the jury has awarded money damages, this Court will deny the award of attorney's fees to the plaintiff herein.

• • • •

Dated: April 27, 1973.

OLIVER J. CARTER

United States District Judge

Entered: April 30, 1973.

APPENDIX C

United States District Court
Northern District of California

No. C-71-973 SC

Tejpal S. Sethy,
Plaintiff,

vs.

Alameda County Water District, et al.,
Defendants.

[Filed Mar. 18, 1977]

ORDER

This matter having been tried by a jury, and a verdict against defendant in the sum of $35,000 having been rendered, both parties now seek clarification of certain orders of the court pertaining to reinstatement of plaintiff to his former position of employment. Plaintiff also seeks reconsideration of this court's denial of an award of attorneys' fees.

• • • •

4. *Attorneys' Fees*

Although an award of attorneys' fees was authorized by the Civil Rights Attorneys' Fees Award Act of 1976 in cases of employment discrimination brought pursuant to 42 U.S.C. § 1981, and although the Ninth Circuit has held that the Act applies retroactively to all cases pending on the date of its enactment, plaintiff's motion for reconsideration of the court's denial of attorneys' fees is denied.

First, this case was not pending on the date of enactment. The Act was signed into law on October 19, 1976; the Ninth Circuit affirmed this court's decision in September 1976. The court does not regard the motions now before it as maintaining the pendency of the action. This case was decided and affirmed prior to the Act's enactment date; all that is before the court now is certain details of implementation, and not the merits of the dispute itself.

Second, an award of attorneys' fees in any event lies within the court's discretion. Though the court should ordinarily award such fees unless special circumstances render such an award unjust, Congress expected the courts to use their discretion to avoid windfall awards. *Compare Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), with *H. Rep. No.* 94-1558, 94th Cong., 2d Sess. 9 (1976).

To the extent that the Act is applicable to this case, therefore, the court denies an award of attorneys' fees for the reasons stated in its order of April 30, 1976. [sic—the year should be 1973].

SO ORDERED.

Dated: March 18, 1977.

SAMUEL CONTI
United States District Judge

Entered: March 18, 1977.

Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-845

ALAMEDA COUNTY WATER DISTRICT,
Petitioner

vs.

TEJPAL S. SETHY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OPPOSING CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

Petitioner presents no issue worthy of Supreme Court review. This Court has already determined in *Hutto v. Finney*, 437 U.S. 678 (1978) that the Civil Rights Attorneys' Fees Awards Act applied retroactively and has discussed the principles of such retroactive application in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).[1] Petitioner

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[1]In *Bradley*, this Court stated that a case was to be considered as "pending" for purposes of retroactivity until "the availability of appeal has been exhausted *or* has lapsed, and the time to petition for certiorari has passed." 416 U.S. at 711, n.14.

cannot point to any Circuit Court decisions which conflict with the Ninth Circuit decision herein. Moreover, this case presents a peculiar procedural sequence that is unlikely to occur again. Thus, no purpose would be served by this Court's review.

Petitioner's assertion that the Ninth Circuit decision conflicts with this Court's decision on retroactivity represents an attempt to create conflict where none exists. The two Supreme Court cases upon which petitioner relies, *Bradley* and *Hutto,* authorized awards of attorneys' fees and favorably established the principle of retroactive application of attorneys' fees statutes to pending cases. Neither decision rejected that principle. Neither decision created any exception to that principle which would prohibit an award. These cases therefore fully support the Ninth Circuit decision.

Petitioner's assertion that the Ninth Circuit decision is contrary to, or unsupported by, the legislative history of the Act is also manifestly incorrect. That history is replete with statements requiring retroactive application.[2] Not a single statement negates that principle or provides a restriction enabling an exception in this case. Thus, this case is a stronger case for retroactive application than was *Bradley* where Congress had remained silent on retroactivity.

[2]*E.g.*, H.R. Rep. No. 94-1558, 94th Cong.2d Sess., p. 4, n.6, (1976); 122 Cong. Rec. 12160 (Representative Drinan, October 1, 1976); 122 Cong. Rec. 33314 (Senator Abourezk, October 1, 1976); 122 Cong. Rec. 35118 (Representative Anderson, October 1, 1976). A motion on the floor of the House to make the Bill prospective in application was also resoundingly defeated. 122 Cong. Rec. 12166 (October, 1976).

Finally, petitioner urges that a pre-Act determination on fees by the District Court precluded its subsequent consideration of an award under the Act. Petitioner neither raised this argument before the District Court, nor before the Ninth Circuit. Thus, this Court's review of that issue for the first time would be inappropriate, particularly since review would include an interpretation of the lower court's orders and of the Act's legislative history in light of the particular facts of this case, both of which should be done initially by the lower courts. Review would be inappropriate for the further reason that there is no conflict on this issue between the Ninth Circuit and any other Circuit.[3] Indeed, the issue has not even been considered by the Circuit Courts.

CONCLUSION

This is precisely the type of case in which attorneys' fees should be awarded under the Act. The legislative history specifies that the Act covers employment discrimination cases brought under 42 U.S.C. § 1981.[4] The facts of discrimination were sufficiently egregious to merit a jury award of $35,000 in damages in addition to reinstatement. Respondent prevailed, not only at trial, but also in a far reaching *en banc* decision on the merits by the Ninth Cir-

[3]The only Circuit Court decision cited by petitioner, *Du Buit v. Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976), is irrelevant. In *Du Buit,* fees were sought subsequent to a final Circuit Court decision under a statute which was in full force and effect throughout the litigation. Thus, no retroactivity issue was present. Rather, the court held that fees should have been requested before a final order was issued.

[4]*E.g.*, S. Rep. No. 94-1101, 94th Cong. 2d Sess., pp. 3, 4, 6 (June 29, 1976); H. Rep. No. 94-1558, 94th Cong. 2d Sess., p. 4 (Sept. 15, 1976).

cuit and then a unanimous decision by the Ninth Circuit on attorneys' fees. The legislative history emphatically notes that the important right to be free from discrimination could be rendered meaningless without an award of fees in cases such as this.[5]

Petitioner has raised no important question of law. Petitioner presented no cases in conflict with the Ninth Circuit decision. Indeed, the cases and legislative history discussed by petitioner provide strong support for the Ninth Circuit decision.

For the foregoing reasons, the petition for certiorari should be denied.

Dated: December 17, 1979.

Respectfully submitted,

STEFAN M. ROSENZWEIG
STEPHEN E. RONFELDT
Attorneys for Respondent

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[5]*E.g.*, S. Rep. No. 94-1101, 94th Cong. 2d Sess., p. 2 (June 29, 1976).